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No. 09-1333

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

FERNANDO CANTO,

Petitioner,

—v.—

ERIC H. HOLDER, Attorney General of the United States,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY BRIEF FOR PETITIONER

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Petitioner's Reply Brief

The Government attempts to show that the circuits are harmonious on the ongoing availability of Section 212 relief despite the fact that the circuit courts have fragmented into multiple camps with contradictory legal tests. In most cases, including the decision by the Court of Appeals below, the circuits have reached the wrong result, requiring Section 212 petitioners to make a particularized showing that they relied upon the existence of Section 212 relief. A case-by-case assessment of individual reliance has never been required by this Court's retroactivity jurisprudence.

The Government can point only to dicta to support its case-by-case stance. No sense can be made of the pastiche of legal standards that have developed on this issue. Certiorari should be granted to correct the erroneous standard adopted by many of the circuits, which improperly limits the relief available to Mr. Canto and the thousands that are similarly situated to him.

I. THE GOVERNMENT CANNOT RATIONALIZE THE DISPARATE RESULTS REACHED BY THE CIRCUITS

The circuits are deeply split on whether and how to assess individual reliance in the context of the Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA") retroactivity. This split will lead to irreconcilable results going forward if certiorari is not granted. Pet'r Br. at 9-16. First,

there is a division between circuits that do not incorporate individual reliance in their retroactivity analysis at all, such as the Third, Eighth Circuits, as well as a panel on the Fourth Circuit, and those that do.[1] Pet'r Br. at 10-15. Further, even amongst the 'reliance' circuits, there is a split between whether a defendant's failure to take a guilty plea constitutes a lack of reliance per se or whether a case-by-case assessment where no plea is taken is warranted. Id. Finally, there is a division between whether a Section 212 petitioner must show he 'actually' relied upon the availability of this relief or whether reliance should be inferred under an 'objective' test. *Id.* at 11-14.

The Government does not seriously dispute the disparate tests fashioned below, but rather attempts to trivialize this division by arguing that many of the circuits have incorporated individual reliance in

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[1] The Government argues that the Third and Eighth Circuits have fashioned tests for retroactivity that look to an individual's reliance as one factor in determining whether a statute is retroactive. Opp. Br. at 11-12. This assertion is incorrect, as the Third Circuit in *Atkinson v. United States* expressly found, Section 212 remained available despite concluding that the *Atkinson* petitioner did not rely on the ongoing availability of Section 212 in declining to enter into a plea agreement. 479 F.3d 222, 231 (3d Cir. 2007) ("We agree that aliens who were not offered plea bargains did not rely on the existence of section 212(c) relief in deciding to go to trial. This does not cause us pause, however, because the relevant question is whether IIRIRA attached new legal consequences to those aliens' convictions and resulting sentences. The answer, as we have described, is yes.") More to the point, even if the Third and Eighth Circuits "may consider" reliance as a factor in retroactivity analysis, this still represents a split from the other circuits that ***require*** individual reliance.

their tests for retroactivity. Opp. Br. at 13. This observation is inaccurate. As a threshold matter, that many circuits have incorporated reliance tests militates in favor of certiorari as such tests misapply this Court's retroactivity precedent. Infra at 3-7. Further, even assuming that individual reliance plays some role in determining Section 212 availability, there is a significant difference between an 'actual reliance' and 'objective reliance' standard, as the 'actual reliance' tests require assessment of a petitioner's state of mind that require probing privileged conversations with counsel during the formation of the petitioner's criminal defense strategy, whereas the 'objective reliance' tests look to external factors from which reliance may be inferred. These different analyses will lead to disparate results going forward and, on a practical level, will necessarily be fraught with administration issues yielding unpredictable, nonuniform results as seen in the decisions by the circuit courts below.[2]

II. THE GOVERNMENT CONTRADICTS THIS COURT'S RETROACTIVITY PRECEDENT

Mr. Canto demonstrated that this Court's precedents have maintained a strong "presumption against retroactive legislation" that "is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic." *Landgraf v. USI*

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[2] For example, an 'actual reliance' rule would almost certainly require courts to probe privileged discussions between a criminal defendant and his or her trial counsel to determine the extent to which a criminal defendant 'actually relied' upon existing law in crafting trial strategy.

Film Products, 511 U.S. 244, 265 (1994). Under Landgraf, the analysis of whether a statute is retroactive consists of only two factors: (1) whether Congress intended retroactive application of the statute; and (2) whether applying the law retroactively "would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed." *Id.* at 280. The 1990 and 1996 legislative repeals of Section 212 relief do not contain any expression that Congress intended their retroactive application. Neither the Government nor any of the circuit decision below argue otherwise. Thus, the only issue under this Court's jurisprudence is whether the retroactive application of these repeals "would impair rights a party possessed," or to put it as this Court did in *INS v. St. Cyr*, whether it would "impair rights under existing laws." 533 U.S. 289, 321 (2001).

Retroactive repeals of a right to apply for Section 212 relief plainly 'impair' that right. As this Court has just found, IIRIRA has effectively mandated that an immigrant that is convicted of a deportable offense will face deportation whereas that was not the case prior to the Act's 1996 enactment. *Padilla v. Kentucky*, 130 S.Ct. 1473, 1480 (Mar. 31, 2010). Indeed, in light of the undeniably severe harm that deportation causes to a deportee, this Court has concluded that accurate advice regarding deportation is a Sixth Amendment right for every affected individual. Id. at 1482. The analysis in Padilla bears on the issue here, as there is no serious question retroactive application of IIRIRA to Mr. Canto impairs his rights by making the serious

consequence of deportation a certainty. As such, Mr. Canto, and those similarly situated to him, should retain their right to seek Section 212 relief. No further case-by-case test for individual 'reliance' on prior law is sanctioned by this Court's precedent or appropriate in light of the strong presumption against retroactivity.[3]

The Government argues that since some circuits have fashioned tests requiring individual reliance, certiorari need not be granted. Opp. Br. at 13. The opposite is true. The fact that the circuits are applying divergent versions of a reliance test calls out for intervention by this Court. Many of the circuit decisions show a widespread misapplication of this Court's retroactivity precedent that should be corrected. The Government relies upon dicta by this Court in *St. Cyr* to justify the 'reasonable reliance' test adopted by the Court of Appeals. *Id.* at 8-10. Specifically, the Government claims that the discussion by this Court regarding the plea agreement entered into by the petitioner in *St. Cyr* shows that this Court authorized a case-by-case reliance approach. Id. However, nothing in the discussion of the plea agreement in *St. Cyr* purported to overturn the retroactivity analysis set forth in *Landgraf* or otherwise impact the longstanding presumption against retroactivity. [4]

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[3] The Government suggests that Mr. Canto takes no issue with a case-by-case rule of reliance. Opp. Br. at 10n8. That is incorrect. Pet'r Br. at 19-22.

[4] Further, as the Government has noted, the plea agreement in *St. Cyr* came after the 1990 amendment to Section 212, which made the fact that the *St. Cyr* petitioner had obtained a

See St. Cyr, 533 U.S. at 315-16.

The Government also relies upon a discussion of *St. Cyr* in *Fernandez-Vargas v. Gonzalez* that they claim supports a reading that *St. Cyr* requires an assessment of individual reliance on Section 212. Opp. Br. at 9-10 (citing 548 U.S. 30 (2006)). This analysis fails because *Fernandez-Vargas* is factually distinguishable. The conduct in that case was ongoing at the time that the IIRIRA provisions at issue were promulgated. *Fernandez-Vargas*, 548 U.S. at 44-46. The Court cited *St. Cyr* to draw a distinction between pre-IIRIRA conduct that should not be subject to retroactive application of the statute, such as Mr. Canto's vested eligibility under Section 212 at the time of his 1983 convictions, as opposed to ongoing conduct that continued after the enactment of the IIRIRA and therefore did not involve retroactive application of the statute.[5] *Id.*

Finally, the Government asserts that *St. Cyr* does not apply to Mr. Canto because his conviction came before the 1990 amendment to Section 212, unlike the petitioner in *St. Cyr*. Opp. Br. at 12. That two amendments took place between Mr. Canto's

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conviction of less than five years material to the question of whether he would have been eligible for Section 212 relief but for the subsequent enactment of the IIRIRA. *St. Cyr*, 533 U.S. at 314-15. This is irrelevant to the question presented here, as there is no question that Mr. Canto would be eligible for Section 212 relief but-for the IIRIRA.

[5] Further, in *Fernandez-Vargaz*, this Court found that Congress intended that the relevant IIRIRA provision reached the conduct at issue in that case. 548 U.S. at 39-42. This further distinguishes *Fernandez-Vargas* from the case at bar.

convictions and his order of deportation does not change the fact that Mr. Canto has found his rights limited under retroactive application of the IIRIRA. Accordingly, this Court's intervention is necessary to correct the application of the individualized 'reasonable reliance' test adopted by the Court of Appeals.

III. THIS ISSUE AFFECTS THOUSANDS EVERY YEAR AND WILL CONTINUE TO DO SO

Mr. Canto's case comes before this Court from convictions imposed twenty-seven years ago. There is no reason to suspect that the pipeline of cases bearing similar facts will empty anytime soon give that the retroactivity issues presented in this petition apply to criminal convictions up to the 1996 IIRIRA repeal of Section 212. [6] Even one unwarranted deportation of an individual that should be eligible for Section 212 relief should merit certiorari. Many thousands of such cases certainly do.

To downplay the magnitude of this issue, the Government notes a decline in Section 212 petition grants since the time the Department of Justice implemented rules that made Section 212 available only following certain types of guilty pleas. Opp. Br. at 15-17. The statistics relied upon by the Government are highly suspect. The figures show

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[6] This Court is seeing this pipeline first-hand given that this is at least the twelfth petition on this issue the Court has received since *St. Cyr*. Opp. Br. at 7-8.

substantial variation in reported Section 212(c) grants for a given year across different reporting periods. As but one example, 2007 Department of Justice data recorded only 392 grants for 2004, but 2008 data, recorded 1,905 grants for the same year.[7] This reported five-fold increase in Section 212 grants reported for 2004 between 2007 and 2008 hardly supports the Government's claim that this problem is diminishing, nor does it indicate that the government's data is a reliable bellwether on this issue. The Government's data also shows a high degree of variability from year to year, again defying the Government's argument that this issue is diminishing over time. For example, the 2009 data (which of course may be revised substantially in subsequent years), shows that the number of Section 212 applications actually increased from 2005 to 2006, and dropped less than three percent from FY 2006 to 2007. *See* Executive Office for Immigration Review, U.S. Dep't of Justice, FY 2009 Statistical Year Book R3 (2010) at Table 15, http://www.justice.gov/eoir/statspub/fy09syb.pdf (last visited Aug. 23, 2010). This data reveals only volatility, not any meaningful trends.

Even with the 'decline' the Government argues exists, the figures it relies upon show that well over

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[7] *Compare* Executive Office for Immigration Review, U.S. Dep't of Justice, FY 2007 Statistical Year Book R3 (2008) at Table 15, *available at* http:// www.justice.gov/eoir/statspub/fy07syb.pdf (last visited Aug. 23, 2010), with Executive Office for Immigration Review, U.S. Dep't of Justice, FY 2008 Statistical Year Book R3 (2009) at Table 15, http://www.justice.gov/eoir/statspub/fy08syb.pdf (last visited Aug. 23, 2010).

fifteen hundred Section 212 petitions have been received by the Department in 2009 alone. Opp. Br. at 16. In any event, a decline in Section 212 grants is unsurprising since, under the Department's newly-implemented guidelines, Section 212 relief is only available in the narrow class of cases where a petitioner enters into certain types of plea agreements. *Id.* at 3. Moreover, the publication of the Department's strict requirements for Section 212 availability has likely deterred applications for Section 212 relief by any potential petitioners that do not fall within the narrow eligibility criteria adopted by the Department. None of these statistics means that the affected class of potential petitioners has diminished over time.

Additionally, this petition comes five years following the initiation of removal procedures against Mr. Canto, meaning there is at least a five year backlog of removal procedures that may implicate Section 212 issues that are unaccounted for at this time. There is every reason to suspect that reporting from this backlog (as well as figures from future years) will show a rise in removal proceedings raising Section 212 issues given recent changes in Government policy. For example, the Department of Homeland Security has issued proposed rules that would require lawful permanent residents issued non-expiring green cards to apply for renewable cards. *See* Application Process for Replacing Forms I-551 Without an Expiration Date, 72 Fed. Reg. 46922-01 (Aug. 22, 2007). This new regulation would permit background checks on applicants that could lead to removal procedures against individuals found to have committed crimes

in the past.[8] *Id.* at 46923-24. Similarly, the new "Secure Communities" initiative, which is being rolled out between 2009, and 2013, will also ultimately result in immigration and background checks for everyone brought to a county jail.[9] The imminent increase in background checks on lawful permanent residents in both programs is more likely lead to an increased incidence of Section 212 issues, not a reduction as the Government claims.

The Government cannot rebut Mr. Canto's showing that the issues presented here are significant and of great concern for an affected class of thousands of long-settled immigrants throughout this country and are likely to continue to reach the courts in the coming years. The jumbled results reached by the circuits below provide an unsatisfactory answer for these individuals, who are leading productive lives and have formed strong roots within their communities and should not be burdened with the extreme sanction of deportation where Section 212 relief was available.

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[8] This program appears to have begun only in 2006 as the first set of procedures for the program were issued in June, 2006. *See* Interoffice Memorandum from Michael L. Aytes, Assoc. Dir. Of Domestic Operations, U.S. Citizenship and Immigration Servs., U.S. Dep't of Homeland Sec., to Reg'l, Dist., Field Office and Serv. Ctr. Dirs. and Nat'l Benefits Ctr. Dr. (May 11, 2007), *available at* http://www.uscis.gov/files/pressrelease/I90EPSNS051107.pdf (last visited Aug. 23, 2010).

[9] See U.S. Immigration and Customs Enforcement, Secure Communities, http://www.ice.gov/secure_communities/deployment/ (last visited Aug. 23, 2010).

IV. MR. CANTO'S WAIVER OF HIS APPEAL DEMONSTRATES RELIANCE ON EXISTING LAW

The Government is incorrect in arguing that Mr. Canto's waiver of his right to appeal his criminal trial verdict can not constitute reliance on existing law. Opp. Br. at 13-14. Mr. Canto's waiver of his appeal caused him to give up a significant legal right to secure a relatively short two year conviction and remain eligible for Section 212 relief. Further, it avoided the expense of an appeal and post-appeal proceedings for the Government. This was a quid-pro-quo exchange of the same type as the quid-pro-quo exchange discussed by this Court in the context of a plea agreement in *St. Cyr*.

The Government suggests that Mr. Canto did not rely upon existing law in waiving his appeal, arguing that because Mr. Canto's 1983 convictions "were not subject to the five year imprisonment ceiling" put in place in 1990, he did not sufficiently rely on the availability of Section 212 relief in waiving his appeal. In Mr. Canto's case, however, it made perfect sense to forego an appeal given the relatively short term of his sentence and the fact that he remained eligible for Section 212 relief. Pet'r Br. at 7. His waiver shows reliance on existing law, including Section 212, and the Court of Appeals' failure to consider it as such is an additional error that this Court should correct.

V. CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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